

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11556 of 1994

with

SPECIAL CIVIL APPLICATION No 11737 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

GONDALIA DHIRAJLAL BANABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 11556 of 1994
MR HJ NANAVATI for Petitioners
MR SR DIVETIA for Respondents No. 1 and 2
MS SEJAL K MANDAVIA for Respondents No.3 and 4
2. Special Civil Application No. 11737 of 1994
MR HJ NANAVATI for Petitioners
MR SR DIVETIA for Respondent No. 1
MS SEJAL K MANDAVIA for Respondents No. 2 and 3

CORAM : MR.JUSTICE S.K.KESHOTE

ORAL JUDGEMENT

1. As both these special civil applications proceed on common facts and grounds, the same are being taken up for hearing together and are being disposed of by this common order.

2. Shri H.J. Nanavati, the counsel for the petitioners, has advanced the arguments with reference to the special civil application No.11556/94, and as such, the facts are taken from this special civil application.

3. The petitioners in both these special civil applications possess all the requisite qualifications prescribed for the post of Primary Teachers to be appointed in the Primary Schools in the District Panchayat. The respondent Junagadh District Panchayat had on 13th August, 1989 given an advertisement in three daily Gujarat Newspapers viz. 'Phoolchhab', 'Sandesh' and 'Jaihind' inter-alia inviting applications for filling up the posts of Primary Teachers in the schools run by it. At the bottom of this advertisement, the number of approximate vacancies to be filled in was shown to be as 592. In response to the said advertisement, all the petitioners have applied for the posts. Pursuant to their applications, the petitioners were called for interview vide letter dated 18th November, 1989 and interviews were fixed on 28th and 29th November, 1989. The recruitment and other service conditions to the posts of Primary Teachers are regulated under the provisions of Gujarat Panchayat Services (Primary Teachers' Recruitment) Rules, 1970 (hereinafter referred to as 'the Rules, 1970'). The petitioners have come up with a case that the interview call letters have been sent to them wherein serial/rank number of the candidates concerned were given. Referring to Rule 8 of the Rules, 1970, the petitioners stated that the rank number on the interview call letters are given because after receipt of the applications from the candidates, a list of qualified candidates is required to be prepared by the Administrative Officer. This list has to be arranged in the order of percentage of marks obtained by the candidates at the qualifying examination. Pursuant to the said interview call letters, the petitioners appeared before the Selection Committee duly constituted under the Rules, 1970. The petitioners stated that after the interviews were over, to the best of their knowledge, the select list is prepared and all the petitioners, according to their information, are selected for the posts. However, they made a statement that whatever

stated aforesaid is subject to what may be pointed out by the other side. The petitioners have further stated that so far as the petitioner No.2 is concerned, his name was stated to be placed at Sr. No.81 in the select list. The petitioners were expecting their appointment orders but under the circular dated 5th January, 1990, the respondent-State Government directed the District Panchayat concerned not to make appointments of general candidates so selected unless and until the backlog posts of reserved candidates are first filled in. As a consequence thereof, the petitioners stated that the appointments were not made by the respondents from the select list prepared in response to the advertisement dated 13th August, 1989. The petitioners have further given out that as per their information, the backlog of the reserves posts was of 469 posts but against that backlog, the District Panchayat has filled in 809 posts which were more in number than what the backlog was there. Against this recruitment of the reserved category, the petitioners stated that there was a hue and cry about the bonafides of the Panchayat to make these appointments. Thereafter the District Development Officer, Junagadh District Panchayat started inquiry somewhere on 6th August, 1991 and as a result of the said inquiry it was found that out of 809 candidates so selected from the reserved categories about 420 candidates were either not eligible or their certificates were forged and/or bogus and/or concocted and also manipulated. As a consequence of that report of the inquiry, the services of 420 candidates belonging to reserved categories were terminated. The petitioners further averred that the aforesaid candidates tried to challenge that action of the Panchayat before this Court but the special civil application filed by them came to be dismissed somewhere in the month of May or June, 1994. However, neither of the parties have given the details of that special civil application filed by those persons before this Court. However, the parties are not on issue that none of the appointees out of 420 whose services were terminated was taken back in service. The petitioners made several representations from time to time to the respondents and prayed therein for giving them the appointments from the select list as prepared in response to the advertisement dated 13th August, 1989. To their shock and surprise, the second advertisement was given by the Panchayat in only one daily Gujarati Newspaper i.e. Gujarat Samachar on 21-9-1994 inter-alia inviting applications for the said posts. A copy of this advertisement has been placed on record of this special civil application as annexure 'C'. After that advertisement, the petitioners made a representation

dated 26th September, 1994 wherein it has been mentioned that they should be first given the appointments on the said posts as the select list was not operated on account of some malpractice by the then Administrative Officer but when nothing has been done on those representation of the petitioners, they have approached to this Court by way of this special civil application.

4. The petitioners have filed further additional affidavit wherein certain facts have been stated to which the reference shall be made in the later part of the judgment at the appropriate place.

5. The respondent No.4 in the special civil application No.11556/94 has come up with a case that though the petitioners were amongst the candidates who were interviewed but the select list was not prepared as the Government issued direction vide circular dated 2nd January, 1990 to fill up the posts of Primary Teachers by giving appointments to schedule tribe candidates. According to the government circular dated 2nd January, 1990 there was backlog of 4900 posts of Primary Teachers of schedule tribe category. Further circulars were referred of the respondents No.2 and 3 dated 12-1-1990 and 15-2-1990 under which the directions were given to fill in the backlog of S.T. category after holding open interview. It is admitted position in the reply that 469 posts were required to be filled in in the Primary schools of Veraval, Porbandar and Una Talukas of Junagadh District by recruiting schedule tribe candidates. As against these 469 posts of Primary Teachers admittedly 809 candidates of the S.T. category were appointed and the respondent further admits that the appointment of the candidates in excess of 469 was illegal and ultimately their services were terminated. It has next been averred that as per the Government notification dated 30th December, 1986, earlier select list would operate until next select list is finalised and it would lapse as soon as the next select list is prepared. Reference has been made to the circular of the Government dated 19th April, 1993 clarifying the above position. As per this later circular, the select list of the candidates selected by the Panchayat Services Selection Committee would operate for a period of one year or until the new select list is published, whichever is earlier. So as per the case of the respondents, the select list would automatically lapse as more than five years have lapsed by now and it would be contrary to the Rules, 1970 to operate the aforesaid select list prepared in response to the advertisement dated 13th August, 1989. In pursuance of the direction of the Government as contained in the

circulars dated 22-8-1994 and 25-10-1994, the respondent-District Panchayat has taken the action to fill up the vacant posts of 477 in Una, Veraval and Porbandar Talukas and in pursuance thereof the advertisement has been issued, reference of which has already been made earlier.

6. The respondent No.2 has also filed affidavit in reply to this special civil application and defence of it is almost identical to the defence taken by the District Panchayat.

7. Shri H.J. Nanavati, learned counsel for the petitioners contended that once the names of the petitioners were placed in the select list then they have acquired the right of appointment and this right could have been defeated only in lawful manner and not otherwise. It has next been contended that the day on which the advertisement is given there was no question of any backlog otherwise the advertisement would have been given only for the reserved categories. The backlog even if it was there in the later point of time, the select list which has been prepared in response to the advertisement dated 13th August, 1989, could not have been made go by. If we go by the number of backlog vacancies and the number of candidates who have been appointed then still substantial number of candidates who have been placed in the select list in response to the advertisement dated 13th August, 1989 has to be given the appointment. The appointments of 809 candidate have been made and in the advertisement dated 13th August, 1989, approximate posts were stated to be 569 and total backlog posts were 459 and if we go by the total appointments made then there is no justification on the part of the respondents not to operate the select list to the extent of availability of the posts, which remained after filling up of the post by S.T. category in the garb of the circular of the Governmennt dated 2nd January, 1990.

8. On the other hand, the counsel for the respondents contended that the petitioners have no indefeasible right of appointment merely because they have been empaneled. This right of the petitioners can be denied for good and sufficient reasons leaving apart the question whether the select list is prepared or not. The counsel for the District Panchayat, Ms. Sejal Mandavia contended that in case the Government decides to first fill up the backlog vacancies of S.T. category then it is a good and justified ground not to act upon the select list. In support of this contention, the counsel for the respondent-District Panchayat, Ms. Sejal

Mandavia, placed reliance on the decision of the Hon'ble Supreme Court in the case of Shankaran Dash vs. Union of India reported in 1991 (3) SCC 47 and three decisions of this Court in the cases of Rathore Jahabhai vs. State of Gujarat reported in 1995 (1) GLR 427, N.S. Mishra vs. Ahmedabad Municipal Corporation reported in 1995 (1) GLR 483 and Commissioner of Police vs. Santosh Vasant Mali reported in 1995 (2) GLR 1640. By referring to the decision of the Hon'ble Supreme Court in the case of State of Bihar vs. Mohammed Kalimuddin reported in JT 1996 (1) SC 271, Ms. Sejal Mandavia contended that in case the select list is not operated for the purpose of giving the appointments to the reserved categories it cannot be said to be illegal, arbitrary or in violation of any of the provisions of Articles 14 and 16 of the Constitution. It has next been contended by Ms. Sejal Mandavia that even if we go by the Rules, 1970 then the select list which has been prepared has its life till the next select list is prepared and there is no dispute in the present case that the next select list has been prepared of the candidates of S.T. category and as such this select list, on which reliance has been placed by the petitioners stood lapsed. Lastly, Ms. Sejal Mandavia contended that it is not the case of how many candidates have been appointed in the select list. The requirement of rule is that where the second list is prepared the earlier select list prepared stood lapsed.

9. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

10. The point that even if the vacancies are available to number of candidates found fit then too the successful candidates do not acquire an indefeasible right of appointment, is no more res integra and reference in this respect has rightly been placed by the learned counsel for the District Panchayat, Ms. Sejal Mandavia on one decision of the Hon'ble Supreme Court and three decisions of this Court referred above. Even if I proceed with the assumption that the select list has been prepared in the present case in pursuance to the advertisement dated 13th August, 1989 and the petitioners were empaneled therein still they have no indefeasible right of their appointment and this right of their can be defeated by giving out a reasonable and justified grounds for the same. So the question which arises for the consideration of this Court is whether on the basis of the circular of the Government dated 2nd January, 1990 wherein the directions were given to the District Panchayat to fill in the backlog of S.T. category can be a reasonable ground for the purpose of denying the

appointments to the empaneled candidates in the select list, which has been prepared in response to the advertisement on 13th August, 1989.

11. In the case of State of Bihar vs. Mohammed Kalimuddin (*supra*), their Lordships of the Hon'ble Supreme Court had occasion to consider somewhat similar question. There also the select list had been prepared and the State Government in the meanwhile desired to revise its reservation policy and therefore it passed a general embargo against recruitment from old waiting lists. It was a case of State of Bihar therein that the rules as per the modified policy are in the process of being formed and further appointments will be made as per the revised rules. In the background of these facts, the Hon'ble Supreme Court has observed that if the State Government was considering a change in the reservation policy of the State, it was not obliged to fill up the existing vacancies. The case in hand is not on better footing than what it was there before the Hon'ble Supreme Court. In the present case, the backlog vacancies of S.T. category were there and it appears to be an apparent mistake on the part of the District Panchayat to invite the applications from general category under the advertisement dated 13th August, 1989. It is not the case of the petitioners that these backlog vacancies have arisen after 13th August, 1989. From the facts which have been brought on the record, it is not disputed that these backlog vacancies are of the period earlier to 13th August, 1989 and by the time these backlog vacancies have been filled in, there is a possibility of some more addition to that number which was there earlier to 13th August, 1989. Total appointments have been made under this category of 809 candidates. It is different matter, for the reasons as stated earlier, that many of the appointments were found to be as a result of malpractice and services of those persons have been terminated but the fact remains that the appointments have been made against the backlog vacancies of the S.T. category and what the Government has given the direction has been fulfilled. So the appointments have not been given to the petitioners for the reason to fill in the backlog vacancies and I do not find any illegality in the action of the respondents if they have not acted upon the select list which has been stated to be prepared in pursuance of the advertisement dated 13th August, 1989. None of the legal or fundamental rights of the petitioners is being infringed, and as such, this contention raised by the counsel for the petitioners is devoid of any substance.

12. The counsel for the petitioners has made a

passing submission also and I consider it to be appropriate to deal with it at this stage. What the counsel for the petitioners contended that out of the select list one lady candidate has been given the appointment, and as such, it is a case where the respondents have adopted the 'pick and choose' formula.

13. The counsel for the respondent-District Panchayat, Ms. Sejal Mandavia, admitted this fact that one of the ladies who applied in response to the advertisement dated 13th August, 1989 has been given the appointment, but she has given out that she filed civil suit in the Court of Junagadh and therein a compromise has been entered into and in pursuance of that compromise that lady has been given the appointment. She further stated that otherwise also, it was a case of consideration of the case of that lady candidate on humanitarian consideration as she was handicapped and that was one of the considerations which had prevailed with the District Panchayat to enter into compromise with that lady in the civil suit. However, if we go technically then what the petitioners have contended may not be 100% incorrect but that is the only one example which has been given out and the petitioners have not brought on record any other examples of giving of the appointments from the select list of the candidates which has been prepared in response to the advertisement dated 13th August, 1989. This has happened in the peculiar facts and as such only on the basis of this one single act, the action of the respondents cannot be termed as arbitrary or illegal or it cannot be said to be a 'pick and choose' formula. The counsel for the petitioners does not dispute that the lady who has been given the appointment was handicapped. So taking into consideration the fact that a handicapped lady has been given the appointment, only on the basis of this ground, no fault can be taken out from this action of the respondents to the extent where the respondents should be directed to give the appointments to the petitioners.

14. Now I may consider another submission raised by the learned counsel for the petitioners. In this case the next select list has been prepared on which there may not be any dispute. Not only this list has been prepared but it has been acted upon and the candidates belonging to S.T. category have been given the appointments. Once the next list is prepared then leaving apart the Government resolution of 1993 if we go by the Rules, 1970 the earlier list prepared stood lapsed. The counsel for the petitioners has tried to draw a thin distinction in between the cases where the appointments have been made

in the second list of the exact number of vacancies advertised earlier in response to which the second list is prepared and the case where in the second list the appointments have been made of the number of candidates less than what the posts were advertised in response to which the first list is prepared, but that is not relevant what is relevant is whether the second list is prepared or not. In response to the circular of the Government of 2nd January 1990 where the directions were given to first fill in the backlog vacancies, the second list has been prepared and leaving apart the fact that some malpractice has been adopted, the appointments have been made more in number than what the posts were advertised. In later point of time out of that list of 809 candidates, good number of candidates were taken out but that is not relevant for deciding this question. Rule only contemplates that in case the second list is prepared than first stood lapsed. The second list was for filling up first the backlog vacancies and to fulfil that object the second list has rightly been prepared and on preparation of the same, the first list stood lapsed. So otherwise on this ground also, the petitioners have no case.

15. There is yet another aspect of the matter which needs to be referred. The advertisement has been given on 13th August, 1989 and if we go by the facts which have been given out by the petitioners in the special civil application, in pursuance thereof the select list has been prepared in the year 1989. The backlog vacancies have been filled in and thereafter the fresh advertisement has also been given in 1994. In view of this fact otherwise also, to give the direction to the respondent to fill up the posts from that list of 1989 i.e. after more than about seven years may not be justified. The petitioners are also responsible for delay in approaching to this Court. The list has been prepared in the year 1989 and the petitioners filed this special civil application before this Court in 1994. The circular of the Government is of 2nd January, 1990 and thereafter the exercise was undertaken to fill up the backlog vacancies. At that point of time, the petitioners have not challenged that action of the respondents before this Court and the respondents were permitted by the petitioners to proceed with the process of selection for the backlog of S.T. vacancies. This delay on the part of the petitioners has remained unexplained. Otherwise also, if the contention of the counsel for the petitioners is accepted then the appointments have to be given to them and result thereof would be to make a room for them by terminating the

services of the S.T. candidates. The appointments cannot be restricted only to the petitioners and in that case the appointments have to be made in the order of merits of the candidates as placed in the select list. The list is of more than 1100 candidates as it come out from the facts and against the posts of S.T. backlog the general candidates will get the appointments. So what this Court will do, will act contrary to what the Constitution contemplates for the reservation of the posts for S.T. category. This Court sitting under Article 226 of the Constitution will not give any such direction which may perpetuate any illegality or unconstitutionality.

16. In the result, these special civil applications fail and the same are dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated.

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